



Commonwealth of Massachusetts  
**DEPARTMENT OF HOUSING &  
COMMUNITY DEVELOPMENT**

Deval Patrick, Governor ♦ Aaron Gornstein, Undersecretary

December 31, 2014

Mr. John S. Leonard, Esq.  
Chairman, Milton Zoning Board of Appeals  
525 Canton Ave  
Milton, MA 02186

**Decision on Grounds for Denial of Comprehensive Permit Application – H& W Apartments-  
Randolph Ave., Milton**

Dear Mr. Leonard:

The Department of Housing and Community Development (DHCD) is in receipt of the Town of Milton's December 12, 2014, letter to H & W Apartments- Randolph Ave., Milton, (Applicant), regarding its application for a Comprehensive Permit. The December 12, 2014, letter seeks to provide notice pursuant to 760 CMR 56.03(8) that the Town of Milton Zoning Board of Appeals (Board) considers the denial of the Applicant's application for a Comprehensive Permit to be consistent with local needs. Specifically, the Board claims that the Town of Milton's denial is consistent with local needs based on the following assertion: Subsidized Housing Inventory (SHI) Eligible Housing units occupy sites in Milton comprising more than 1.5% of the total land area as defined under 760 CMR 56.03(3)(b).

DHCD is also in receipt of a December 24, 2014, letter from the Applicant that challenges the Board's assertion that the Town of Milton's denial is consistent with local needs.

**Background**

Pursuant to 760 CMR 56.03(8), the Board shall have the burden of proving satisfaction of the grounds for asserting that a denial of a permit would be consistent with local needs in accordance with 760 CMR 56.03(1); furthermore, the Board is to provide any necessary supportive documentation regarding the grounds it believes it has met.

**Notice Requirements under 760 CMR 56.03(8):**

The Applicant claims that the Board did not follow the proper procedures detailed in 760 CMR 56.03(8). The Applicant claims that notice was not given within 15 days of opening the public hearing and that the assertion of the 1.5% of the General Land Area Minimum as defined under 760 CMR 56.03(3)(b) was the Town's belief (via Town Special Counsel) not the Board's.

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**General Land Area Minimum as Defined under 760 CMR 56.03(3)(b):**

The Board and the Applicant have submitted conflicting documentation/arguments, notably:

- The Board claims that the Town of Milton has met the 1.5% General Land Area Minimum based on 93.825 acres of what the Board refers to as “total land area dedicated to affordable housing,” divided by 3,557.64 acres of what the Board refers to as “total land area available for development” resulting in a calculation above 1.5%. Related documents submitted by the Board include a letter from the Town Special Counsel Kathleen O’Donnell, a memorandum from Milton’s Director of Planning and Community Development, William B. Clark, Jr., and a map entitled “Chapter 40B Analysis.”
- The Applicant claims the Town has not met the General Land Area Minimum because the Board improperly excluded more than 800 acres from countable total land area (land area zoned for residential, commercial, or industrial use) and overstated the land area dedicated to affordable housing.
- Specifically, the Applicant claims that the Town has 46.895 acres of land area with SHI Eligible Housing units and 4,395.03 acres of total countable land area resulting in a calculation below 1.5%. Related documents submitted by the Applicant include a report from VHB based on MassGIS data, an affidavit by consultant Lynne Sweet, a letter from Fuller Village, and copies of Town of Milton Planning Board Site Plan Approvals pertaining to the Fuller Village development.
- The Applicant claims that only 33 of the 82 units at the development known as Fuller Village were counted on the SHI at the time of its Application (November 6, 2014), but argues that even if 82 units could be counted towards the General Land Area Minimum, the Town would still fall short of 1.5%.
- The Applicant argues that as the 82 units counted on the SHI are only a portion of the 321 units at Fuller Village, the total area at Fuller Village should not be counted as occupied by SHI Eligible Housing units based on the regulatory language of 760 CMR 56.03(3)(b).

DHCD’s Chapter 40B Regulations detail the calculation method for 1.5% Land Area as defined under 760 CMR 56.03(3)(b) as follows:

*General Land Area Minimum. For the purposes of calculating whether SHI Eligible Housing exists in the city or town on sites comprising more than 1½% of the total land area zoned for residential, commercial, or industrial use, pursuant to M.G.L. c. 40B, § 20:*

- 1. Total land area shall include all districts in which any residential, commercial, or industrial use is permitted, regardless of how such district is designated by name in the city or town's zoning by law;*
- 2. Total land area shall include all un-zoned land in which any residential, commercial, or industrial use is permitted;*

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3. *Total land area shall exclude land owned by the United States, the Commonwealth or any political subdivision thereof, the Department of Conservation and Recreation or any state public authority, but it shall include any land owned by a housing authority and containing SHI Eligible Housing;*

4. *Total land area shall exclude any land area where all residential, commercial, and industrial development has been prohibited by restrictive order of the Department of Environmental Protection pursuant to M.G.L. c. 131, § 40A. No other swamps, marshes, or other wetlands shall be excluded;*

5. *Total land area shall exclude any water bodies;*

6. *Total land area shall exclude any flood plain, conservation or open space zone if said zone completely prohibits residential, commercial and industrial use, or any similar zone where residential, commercial or industrial use are completely prohibited.*

7. *No excluded land area shall be counted more than once under the above criteria.*

*Only sites of SHI Eligible Housing units inventoried by the Department or established according to 760 CMR 56.03(3)(a) as occupied, available for occupancy, or under permit as of the date of the Applicant's initial submission to the Board, shall be included toward the 1½% minimum. For such sites, that proportion of the site area shall count that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units).*

**Discussion and Findings**

After careful analysis of all documentation submitted by both the Board and Applicant, DHCD makes the following observations:

**Notice Requirements under 760 CMR 56.03(8)**

After reviewing all documentation DHCD is in agreement with the Board's belief that it has met the timeline and regulatory responsibilities pursuant to 760 CMR 56.03(8). DHCD finds the documentation was submitted to the Applicant and DHCD within 15 days of opening up the local hearing (December 2, 2014) and the documentation was submitted by the Board. DHCD notes that the December 12, 2014, letter was signed by the Board Chairman John S. Leonard, Esq.

**General Land Area Minimum under 760 CMR 56.03(3)(b)**

DHCD finds that the Board has not met its burden of proof in establishing that it has met the criteria of 760 CMR 56.03(3)(b). DHCD agrees with the Applicant that the Board excluded a substantial amount of land from the total land area zoned for residential, commercial, or industrial use as "town owned" that does not appear to be town owned or excludable under 760 CMR 56.03(3)(b). Based upon data from MassGIS and analysis that included maps and a detailed spreadsheet of parcels submitted by the Applicant,

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the land is owned by a variety of private, not-for-profit and charitable entities, and/or the Milton Housing Authority. The land includes a variety of zoning categories and as indicated by the Applicant, some of it contains SHI Eligible Housing units. Based on the Applicant's submission, it appears that parcels improperly excluded by the Board total at least 812.52 acres of land. The Board did not submit a detailed analysis that identifies the parcels that it included and excluded from the total land area.

DHCD also agrees with the Applicant that the Board has not established that the entire land area of the development known as "Fuller Village" counts as land occupied by SHI Eligible Housing units for purposes of 760 CMR 56.03(3)(b). DHCD notes that the appropriate standard is not "land area dedicated to affordable housing" as framed by the Board, but rather it is the proportion of the site area that is occupied by SHI Eligible Housing units (including impervious and landscaped areas directly associated with such units) pursuant to the express language of 760 CMR 56.03(3)(b). As indicated by the Board itself through the supporting documentation it provided, the number of SHI Eligible Housing units at Fuller Village is 82 units (33 units at 1372 Brush Hill Road and 49 units at 1399 Blue Hill Avenue). The Applicant provided documentation showing that Fuller Village consists of 321 units total.<sup>1</sup>

**Conclusion**

DHCD again notes that the Applicant and the Board have met the regulatory timeline(s) pursuant to 760 CMR 56.03(8) based on the information provided. After careful analysis of the documentation submitted and a review of the applicable regulations and guidelines, DHCD is in agreement with the Applicant, the Board has not met the burden of proof in its assertion that a denial with conditions would be consistent with local needs.

If either the Board or the Applicant wishes to appeal this decision pursuant to 760 CMR 56.03(8), that party shall file an interlocutory appeal with the HAC on an expedited basis, pursuant to 760 CMR 56.05(9)(c) and 56.06(7)(e)(11), within 20 days of its receipt of the decision, with a copy to the other party and to the Department.

The Board's hearing of the Project shall thereupon be stayed until the conclusion of the appeal, at which time the Board's hearing shall proceed in accordance with 760 CMR 56.05. Any appeal to the Courts of the HAC's ruling shall not be taken until after the Board has completed its hearing and the HAC has rendered a decision on any subsequent appeal.

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<sup>1</sup> The Applicant also points out that the Board failed to exclude portions of Fuller Village, and other parcels, that are not impervious or landscaped areas directly associated with SHI Eligible Housing units, such as wetlands.

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If you have further questions, please contact Phillip DeMartino, Technical Assistance Program Coordinator, at (617) 573-1357 or [Phillip.DeMartino@state.ma.us](mailto:Phillip.DeMartino@state.ma.us).

Sincerely,



Aaron Gornstein

Undersecretary

Department of Housing and Community Development

cc: Jeffrey B. Mullan, Esq., Board Member  
Virginia Donahue King, Esq., Board Member  
Kathleen O'Donnell, Esq., Town Special Counsel, Milton  
Anne Marie Fagan, Town Manager, Milton  
William Clark, Director of Planning and Community Development, Milton  
Nicholas C. Cramb, Esq., Mintz Levin  
Allan Caggiano, Esq., Mintz Levin

